creation of a second charge in favour of UMBC for the reason, inter alia, that UMBC had delayed in sending the second charge instruments. On 8 May 1979, UMBC proceeded to register a private caveat on the land and on 12 November 1979, it sued the three companies and KK for the outstanding loans in these civil suits. On 12 February 1982, UMBC applied for and obtained an order that the private caveat be extended until the final disposal of the three suits. KK applied to set aside the order and for the removal of the private caveat. On dismissing KK's application, Gunn Chit Tuan had this to say at p 108:

> In this case, the applicant as well as his three companies had already executed the relevant charge as well as a supplementary security agreement and although the bank has not signed the said agreement, it could do so at any time and there was therefore in this case not only an agreement but also in my view an instrument of charge in registrable form. The fact that MBF had not endorsed its consent on an annexure to the said charge which might therefore not be accepted by the relevant administrative authorities, did not in my view detract from the fact that it is an instrument of charge in registrable form and that even if the relevant authorities had refused to accept it for registration, nevertheless the bank had in my judgment a registrable interest in the said lands within the meaning of s 323(1)(a) of the National Land Code 1965.

In view of the undisputed fact that there was a clear intention on the part of the defendant and that of the plaintiff for a second charge to be created for the purpose of securing payment by Hong Kong Securities Ltd to the plaintiff for the sale of the shares in consequence of which WCK3 was duly executed, it would at first sight appear that the plaintiff on the authority of *Krishna Kumar's* case[3] has a right in equity to a registrable interest in the said land within the meaning of s 323(1a) of the National Land Code. It is, however, also not in dispute that the second charge was to be created pursuant to an agreement (appearing as an annexure to the inchoate charge instrument) made more than 12 years ago and that no action has ever been filed to specifically enforce the agreement so that limitation has set in to bar the plaintiff from enforcing any rights, legal or equitable, it might have had under the agreement. In the result, I would make an order in terms of the defendant's application that the order dated 16 December 1981 extending the caveat be discharged and that the caveat presentation no 573/75 vol 74 folio 76 be removed and that the costs of this application be paid by the plaintiff in any event.

Order accordingly.

Solicitors: *Raj Selva & Co; Jackson & Masacorale.*

Reported by *Wong Kim Fatt*

Re TSY (An Infant)

HIGH COURT (PENANG) – PETITION FOR ADOPTION NO 46-4-86
EDGAR JOSEPH JR J
3 MAY 1988

Family Law – Adoption order – Application for – Child given to applicants shortly after birth – Child living with applicants until aged nearly five years – Opposition of natural parents – Whether parental consent to be dispensed with – Whether parental consent unreasonably withheld – Disruptive effect on child – Principles applicable – Adoption Ordinance 1952, s 5(1)

In this case the applicants applied for the adoption of a boy, who was nearly five years old. The boy had been living with the applicants, who are husband and wife, since shortly after birth. The respondents who are the natural parents of the boy opposed the application. The issue in this case is whether upon the evidence and having regard to the relevant provisions of the Adoption Ordinance 1952, the court would be justified in holding that the consent of the respondents to the making of an adoption order is being unreasonably withheld.

Held, allowing the petition: (1) In deciding whether or not to dispense with parental consent, the court must take into account events and conduct right up to the time when the case comes to be considered, whether on the original application for an order or on review by an appellate court.

(2) The court will apply an objective test when considering whether or not to dispense with parental consent on the ground that it is being unreasonably withheld. In this context, the welfare of the child is not the sole consideration to be taken into account though it is a consideration of great importance and has increased in importance over the years.

(3) The disruptive effect on the boy of transplanting him from his familiar surroundings where he has lived for nearly four and half years to his natural parents would be sufficiently permanent and serious to afford cogent reasons for holding that the consent of the natural parents to his adoption was being unreasonably withheld.

[*Editorial Note:* The Adoption Ordinance has been revised as the Adoption Act 1952 (Act 257).]

Cases referred to

1 *Re K (An Infant)* [1963] CLY 1771 (refd)
2 *Re L (An Infant)* (1962) 106 Sol J 611; [1962] 3 All ER 1 (folld)
3 *Re H (Infants)* [1977] 1 WLR 471 (refd)
4 *Re C (L) (An Infant)* [1965] 2 QB 449 (refd)
5 *Re B (S)* (1966) 110 Sol J 671 (refd)
6 *Re PA (An Infant)* (1971) 115 Sol J 586; [1971] 3 All ER 522 (refd)
7 *O'Connor* v *A and B* [1971] 1 WLR 1227 (folld)

Legislation referred to

Adoption Ordinance 1952 ss 5(1), 6(b), 8, 9

Lim Leng Han for the applicants.
S Asamaley for the respondents.

Cur Adv Vult

Edgar Joseph Jr J: This application for adoption concerns a four-year-old Chinese boy ('the boy') born on 23

July 1983 and who is therefore now nearly five years of age. He has been living on a fostering basis (whether permanently or temporarily was disputed) with the applicants who are husband and wife, since shortly after his birth – to be precise on 11 November 1983 – in circumstances which I shall presently be describing. The respondents who are the natural parents of the boy oppose the application.

Although the hearing before me was in camera, the proceedings took the form of a witness action with both sides being given liberty to cross-examine on the affidavit evidence and to adduce evidence.

The issue central to this application is whether upon the evidence before me and regard being had to the relevant provisions of the Adoption Ordinance 1952 ('the Ordinance'), I would be justified in holding that the consent of the respondents to the making of an adoption order is being unreasonably withheld. For the sake of brevity and convenience, all references in this judgment to sections shall be to the Ordinance.

It is perhaps, as well, if at the outset I refer to the provisions of the Ordinance so far as relevant to this case. Section 5(1) provides as a condition precedent that no adoption order shall be made save with the consent of the natural parents but, by way of exception, the provisions of the proviso to s 5(1) empower the court to dispense with such consent if satisfied as to the existence of the exceptional situations defined therein.

Most particularly, the provisions of the proviso (c) to s 5(1) provide:

> Provided that the court may dispense with any consent required by this section if satisfied –
>
> (a) ...
>
> (b) ...
>
> (c) in any case, that the person whose consent is required cannot be found or is incapable of giving his consent or that his consent is unreasonably withheld; or
>
> (d) ...

Then, as if by way of reminder, s 6(b) provides that before an adoption order is made the court shall be satisfied that the order if made will be for the welfare of the infant, due consideration being for this purpose given to the wishes of the child, having regard to the age and understanding of the child.

It will, no doubt, at once be appreciated that the decision whether or not to dispense with parental consent poses a problem more human than legal and must, therefore, be fraught with difficulty and anxiety; it is nevertheless a task which has to be performed. I need hardly add that I am fully aware that the general effect of an adoption order is that it destroys the legal bond between the infant and its natural parents and puts him in precisely the same position as a natural child of his adoptive parents (see s 9). The making of an adoption order may, therefore, be rightly described as the using of a 'statutory guillotine'.

I must now consider the particular circumstances of this case.

The foster father is 57 years of age and his wife, the foster mother, is 45 years of age. The foster father is a building contractor by occupation who claims that he is in receipt of an average income of about $2,000 pm. This aspect of the foster father's evidence was indirectly challenged by counsel for the natural parents, but I find nothing improbable in it, and I therefore accept it as true.

The foster parents appear to be a pleasant, stable couple, with whom the boy has made good progress. They have six children of their own ranging in ages between 25 years and five years – of whom, all but the eldest, reside with them in a terrace house in Argyll Road, Penang. A report from a welfare officer states that the boy is very attached to all the members of the adoptive family which, of course, is hardly surprising in view of the length of time he has been living with them – a period of nearly 4½ years.

The boy himself appears to be a happy and healthy child of average intelligence and mental alertness and I gathered from my private conversation with him that he has every desire to remain with his adoptive parents. But, of course, in the case of a child of such tender age, only little weight ought to be given to expressions of such desire.

On the other hand, the natural father is 35 years of age and his wife, the natural mother, is 30 years of age. The natural father is a goldsmith by occupation and is in receipt of a salary of $600 pm inclusive of overtime. His working hours are from 8.30 am to 6 pm and, on days when he is engaged on overtime duty, he works until 10 pm. In the past, he had been employed as a construction labourer by the foster father. The natural mother works as a coffeeshop assistant and her hours of work are from 6 pm to 1 am. They have two children of their own – both girls – one aged six years and the other aged nearly five years – a twin sister of the boy. They reside in a two-bedroom flat in Butterworth which they purchased some time ago from the government.

I must next turn to consider the rather curious circumstances under which the boy came to be in the de facto custody of the foster parents.

Now, it is not in dispute, and indeed, it is common ground that at the age of four months de facto custody of the boy was given over by the natural parents to the

foster parents and, as I have already stated, he has remained with the latter to the present day. There is, however, an acute conflict of evidence as to the circumstances and, in particular, the reason why de facto custody of the boy was given over by the natural parents to the foster parents.

According to the version of the natural parents, the boy, when he was aged four months was given in their charge to be looked after by them as a temporary measure only as the natural mother was still convalescing from the effects of childbirth and was also experiencing difficulty looking after the first child, who was then only one year and seven months of age, and the boy's twin sister. The foster father was away at work and would return home only in the evenings so that he too was unable to help in this respect. It was when the natural father related his difficulties to the foster father, who was then his employer, that the latter suggested that the boy be looked after by the foster mother until such time when the natural mother had recovered sufficiently to look after all her three children. It was for these reasons – so it was said – that the foster parents were given de facto custody of the boy.

But later, when the natural mother regained her health, the boy continued to live with the foster parents. This was because the natural parents experienced 'financial difficulties which cropped up unexpectedly' necessitating the natural mother to take up employment as a coffeeshop assistant – so it was said. Furthermore, the natural father alleged that he had been contributing $100 pm to the support of the boy until disputes arose between the parties.

However, on or about 23 April 1986, when the foster parents declined to comply with a plea for return of the boy the natural father lodged a police report on the same day alleging that the foster father had demanded a sum of $5,000 as a condition for his return (see en 6 ex T2 p 2). The foster father, of course, denied the demand and I am not satisfied that there was such a demand in the absence of corroboration.

Be that as it may, relations between the natural parents and the foster parents had, in consequence, become strained and, as a result, the natural father ceased working for the foster father.

In the upshot, on 23 June 1986, the foster parents caused to be issued, through their solicitors, the application herein praying for an adoption order.

According to the version of the foster parents, the boy was born with two teeth and because Chinese superstition dictates that such a child would be difficult to bring up, the natural parents had given him to them to adopt; that although there was only a verbal agreement to adopt, an adoption ceremony according to Chinese custom was performed at the Temple of the Goddess of Mercy in Pitt Street, Penang, at which the natural parents were also present.

In answer to the court as to why he had waited until July 1986 before filing the present application for adoption, the foster father explained that the natural parents were dragging their feet when asked for their co-operation in preparing papers, which I took to mean, they were stalling in giving the requisite consent.

It was admitted by the foster parents that the natural parents did make a demand for the return of the boy which was not complied with. It was further admitted by the foster mother that shortly after this – more precisely, on 8 March 1986 she had lodged a police report complaining that the natural father had demanded the return of the boy. Cross-examined as to her report and, in particular, asked to confirm if their contents were true, she gave an affirmative reply. In that report she had stated (in effect) that the boy had been put in her charge in return for a promise by the natural parents to pay $250 pm for his upkeep. But, when some two years and six months later, the natural parents had asked for the boy's return, she had declined the request because the natural parents had not fulfilled their promise to pay for the support of the child. She had added that she had told the natural parents that if they wished to settle the matter they would have to pay a sum by way of maintenance at the rate of $250 pm for the thirty one months during which the boy was in her charge.

But, in re-examination, she had said that although the recording officer, who was a Malay, had read back the report to her she did not understand him. She further stated that it was true that she did tell the natural father that if he wanted the boy back he would have to pay $250 pm for the thirty one months but that she had said this 'to put him off as I knew he did not have the means to pay this sum'. And, she had further stated 'no, when we took over the child there was no arrangement that we look after the child for the natural parents in return for $250 pm.'

In answer to the court, she had also stated that when she made her report she spoke in the Hokkien dialect to a Malay officer who spoke Hokkien and the latter then interpreted what was said to the recording officer who was a Malay. It seems to me that the method adopted in the recording of the report was such as to positively invite the risk of error due to misunderstanding and so I do not consider that the credit of the foster mother was affected by the obvious difference between her version in court as compared to that in her report.

In view of the status and relationship of the parties, I also find nothing improbable in the foster mother's explanation that when she had asked the natural father for

the maintenance of the boy as aforesaid, she had done so merely to put him off as she knew that he did not have the wherewithal to foot such a bill, and I therefore accept it. Besides, if there had indeed been such an agreement to pay maintenance at the inception, then why had she waited until such a late stage to make the demand?

It is, of course, true to say that the natural father claimed that he had been paying a sum of $100 pm for the support of the boy. However, the foster father strongly refuted this. Having seen both of them testify, I was not prepared to accept the natural father's evidence on this point at its full face value. So, there being no corroboration of such payments I prefer the testimony of the foster father especially, bearing in mind, my finding that the boy was given to the foster parents *not* as a temporary measure but for purposes of adoption. There was, however, unchallenged evidence that *after* the application for adoption had been filed, specifically on 7 August 1986, the solicitors for the natural parents had sent to the solicitors for the foster parents a money order for $400, said to be money for the support of the child but this was returned (see ex T7 to en 6). But, I do not regard this evidence of any real assistance to the natural parents.

I am thoroughly convinced that the version of the foster parents as to the circumstances under which and the reason why the boy was given over to them represents the truth. In other words, I am satisfied that when the boy was placed in their care it was for the express purpose of adoption – no doubt an adoption according to Chinese custom – but a de facto adoption nevertheless. It is highly improbable that Chinese parents who believe strongly in the preservation of the family name would give away their only son – a four-month-old boy – unless there was some cogent reason for doing so. I am not persuaded by the reasons offered by the natural parents for this strange course of action, namely, that the natural mother could not cope with having to look after three children at the same time because she was suffering from the effects of childbirth. If so, then why not give the twin girl in the charge of the foster parents instead of the boy? Similarly, I am not persuaded by the reasons offered by the natural parents for the further delay in taking back the boy because of 'sudden financial difficulties which had unexpectedly cropped up' thus necessitating the natural mother to seek employment as a coffeeshop assistant. These reasons, in my view, are a pure invention for they simply do not have the ring of truth.

On the other hand, I find the explanation offered by the foster parents that the child having been born with two teeth – and as to this there was no dispute – the natural parents took this to be a bad omen and were happy to give away the child in adoption. This again is entirely consistent with the fact that soon after birth the boy was given in the care of the mother of a friend of the natural father and it was from her that the foster father took him.

I am also convinced that apart from a sum of $400 in the form of a money order by way of maintenance for the boy, which the natural father sent through his solicitors at a very late stage, namely, on 7 August 1986 – long after disputes between the parties had arisen – the natural parents provided nothing by way of support for the child.

There was, however, evidence that while the natural father worked for the foster father he did visit the boy and play with him almost daily at the house in Argyll Road, which incidentally was also where the foster father had his office. There was also evidence that the natural mother had visited the boy 'once a month or once in three months'. However, there was no evidence that the natural parents or either of them took the boy out or took him to their own home for a break – not even once! Who then has shown greater love to this boy – the natural parents or the foster parents? Common sense will supply the answer to this question.

I must next consider the evidence of the foster parents that a religious ceremony was held on 11 November 1983 at the Goddess of Mercy Temple in Pitt Street – the very day on which the boy was placed in the care of the foster parents – to commemorate the adoption and that the natural parents were present. The natural parents do not dispute their presence there on that occasion, but they claim that the object of the ceremony was not to commemorate an adoption but to observe the birthday of Tua Pakong – the deity of wealth. No credible evidence was led as to the birth date of the deity. Furthermore, it was not disputed that 11 November 1983 was the very day the boy was given over to the de facto custody of the foster parents. I am satisfied that the religious ceremony concerned was indeed intended to mark the adoption of the boy according to Chinese custom.

But, having said all that, does it necessarily follow, ipso facto, that because the natural parents had given away the boy to the foster parents for adoption, they are not entitled to change their mind and ask for the return of the boy and, on that ground, refuse to give their consent? In principle I agree it does not and so the natural parents are entitled to change their mind. However, the decision of the court whether or not it should dispense with parental consent on the ground that it is being unreasonably withheld must depend upon the facts of the individual case. So, for example, in *Re K (An Infant)*[1] where the infant was placed with foster parents with the mother's concurrence, followed by a change of mind, the court held that the refusal of the mother to consent to the adoption was not unreasonable.

In deciding whether or not to dispense with parental consent the court must take into account events and conduct right up to the time when the case comes to be considered, whether on the original application for an order or on review by an appellate court: see *Re L (An Infant)*.[2] Moreover, in considering whether or not to dispense with parental consent on the ground that it is being unreasonably withheld, the court will apply an objective test. In this context, the welfare of the child, as Lord Denning observed in *Re L (An Infant)* is not the sole consideration to be taken into account though it is a consideration of great importance and has increased in importance over the years: per Ormrod LJ in *Re H (Infants)*.[3]

It would appear that the material circumstances of the foster parents are superior to those of the natural parents but I have completely disregarded this factor in considering this application. The judgment of Diplock LJ in *Re C (L) (An Infant)*[4] may be referred to on that point. However, the remarks of Seller LJ in *Re B (S)*[5] show that if a mother has no facilities for bringing up the child, it would be unreasonable for her to withhold her agreement. In the present case, for example, the fact that neither of the natural parents would be able to spend much time with the boy because of their long and demanding working hours was obviously a factor which undermined their case.

I must add, lest I be accused of oversight, that a somewhat feeble attempt has been made by counsel for the natural parents to demonstrate to this court that the foster parents ought not to succeed in their application on grounds of their age and health. It is true that the foster father had admitted to being a diabetic for which he was receiving treatment, whilst the foster mother was suffering from a kidney ailment of which it was said she had been cured. I am afraid that in the absence of medical evidence, I find counsel's submission, as regards this part of the case, quite untenable.

But, what I regarded as a very considerable telling point in favour of the foster parents was the effect on the boy of a change of surroundings in the event of the application being refused and his being restored to his natural parents. A year-old baby would not, it was thought in *Re PA (An Infant)*,[6] be permanently upset by such a change. In that case, the mother whose refusal of her agreement was upheld had become engaged to be married and the infant would receive love and care from the mother and the future stepfather. In contrast, the disruptive element involved in moving a three-year-old boy from the applicants' home where he had lived for two and a half years to the company of his natural parents, who were found to be 'not particularly stable individuals', was one of the reasons given for holding as unreasonable a refusal of agreement in the Scottish case in the House of Lords of *O'Connor* v *A and B*.[7]

In the present case, the boy has been living with the foster parents and their children and grandchildren, for nearly four and a half years during which time, judging from the welfare reports, he has received both love and care. On the other hand, during that time, he has received nothing of the sort worth mentioning from the natural parents. Nor, for that matter did the natural parents appear to be a stable couple judging from their callous disregard for the boy in giving him away when he was still a babe in arms simply because of a superstitious belief arising from the fact that he was born with two teeth. On this point, I accept the evidence of the foster father that this was the real reason for the boy being given away.

In my opinion, the disruptive effect on the boy of transplanting him from his familiar surroundings where he has lived for nearly 4½ years to his natural parents, would be sufficiently permanent and serious to afford cogent reasons for holding that the consent of the natural parents to his adoption was being unreasonably withheld and I so hold.

By way of postlude, it is interesting to note the recognition and importance which the Ordinance accords to de facto adoptions. Section 8 is a blanket provision enabling persons who have custody of a child, brought up, maintained and educated by them under a de facto adoption, for a period of at least two years, to apply for adoption without requiring the consent of any parent or guardian. However, because the boy in this case had not commenced his primary education, it could not be said that one of the pre-requisites of s 8 had been fulfilled; had it been, I would have had no hesitation in making an order for adoption by virtue thereof.

In all the circumstances, not forgetting the welfare of the child, and being satisfied that all the conditions precedent under the Ordinance for the making of an order had been satisfied, I would make an order in terms of prayers (1) and (2) of the application. This, of course, means that the petition for adoption succeeds and with costs.

Order accordingly.

Solicitors: *B T Lee & Co*; *Mohideen & Asamaley*.

Reported by *Ng Sheau Jiuan*